

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|--------------------|
| TIM O. BROTT |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 214,230 |
| BRECKCO CONSTRUCTION COMPANY, INC. |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| CNA INSURANCE COMPANIES |) | |
| Insurance Carrier |) | |

ORDER

On February 4, 1998, the application of claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Bryce D. Benedict on August 19, 1997, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, D. Steven Marsh of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

In claimant's application and claimant's brief, the following issues were raised for Appeals Board determination:

- (1) Whether claimant is entitled to a work disability pursuant to K.S.A. 44-510e.

- (2) Whether an underpayment of temporary total disability compensation was awarded.
- (3) Whether the Administrative Law Judge erred in refusing claimant's request for an extension of his terminal date.

It is noted under nature and extent of injury and disability the parties did stipulate to a 9.5 percent functional impairment.

Respondent, in its brief to the Appeals Board, raised the following additional issues for consideration:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment on the date alleged.
- (2) Whether claimant provided timely notice of the injury.
- (3) Claimant's average weekly wage.
- (4) The nature and extent of claimant's injury and/or disability.
- (5) Whether the decision of the Administrative Law Judge was arbitrary and capricious.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

- (1) Claimant suffered accidental injury on November 24, 1995, when he fell, twisting his back while screeding concrete. Claimant continued working for the remainder of that day and worked the next day, which was a Saturday, for four hours.
- (2) On Monday, November 27, 1995, claimant contacted Don Brand, his supervisor, and reported the accident. He was advised by Mr. Brand to go to the doctor. Claimant thought that he had told Mr. Brand that his back problem was work related but he could not be positive. He was pretty certain he had told Mr. Brand he had fallen in the mud while working on Friday and that he thought his back would get better over the weekend, but it did not.
- (3) After a period of conservative medical treatment, claimant attempted to return to work. However, respondent was unable to accommodate the restrictions placed upon claimant by Dr. Joseph Huston and Dr. Edward J. Prostic. Dr. Prostic restricted claimant to up to 50 pounds lifting 20 times in an 8-hour day or less and up to 25 pounds lifting 60

times in an 8-hour day or less. Dr. Prostic opined that if claimant tried to work in excess of that he would overload his back. Claimant was also restricted to infrequent bending, stooping, and especially forward bending for the same reasons. The restrictions placed upon claimant by Dr. Huston were the same as those placed upon him by Dr. Prostic.

(4) An extensive report of claimant's job tasks was prepared for claimant's review at the regular hearing. This report displayed in detail certain jobs with general job task descriptions attached to each. Claimant was provided a copy of the report before the regular hearing but did not have the opportunity, or did not take the opportunity, to review same in detail. At the regular hearing both claimant's attorney and respondent's attorney attempted to examine claimant regarding this job task report. Claimant was unable to discuss in detail these tasks as he had not taken the opportunity to fully analyze the jobs detailed in the report.

(5) It is uncontradicted that respondent was unable to accommodate claimant within claimant's restrictions. The February 10, 1997, letter from claimant's attorney to respondent's attorney discusses the fact that claimant requested accommodation, but no offer of accommodation was forthcoming.

(6) Claimant was referred to a vocational rehabilitation specialist, Doug Lindahl. Mr. Lindahl provided claimant with eight different job leads which would have paid claimant up to \$8.19 per hour. Claimant made no attempt to apply for any of these job leads or follow up on any of the recommendations by Mr. Lindahl because he didn't really care or they weren't really what he was looking for. Claimant further stated that because the jobs would not allow him to earn between \$9 and \$10 per hour they were not worth pursuing. Claimant has not filled out any job applications and has made only approximately four contacts with any employers for any type of employment since being released from medical treatment. Claimant did receive a substantial amount of unemployment compensation but once the unemployment benefits ceased, claimant's attempts at locating employment also appeared to cease.

(7) Dr. Prostic was provided a copy of claimant's job task analysis report. He had approximately 5 to 15 minutes to review the information before his deposition and had no information regarding claimant's specific job history. In discussing the various job descriptions, Dr. Prostic would at times indicate claimant had the ability to perform certain tasks and at other times merely discussed whether claimant had the ability to perform certain jobs. While this job analysis was broken down into individual tasks, the doctor did not present a uniform opinion regarding what, if any, specific job tasks claimant was unable to perform as a result of his injury. Multiple objections were raised by respondent regarding the consideration of this job task analysis as it had never been properly identified by claimant at the regular hearing.

(8) At the time of the accident, claimant was earning \$9.85 per hour working 40 hours per week which equates to a straight time rate of \$394 per week. In addition, claimant earned \$43.73 per week in overtime which equates to an average weekly wage of \$437.73.

This average weekly wage was found to be appropriate by the Administrative Law Judge and the Appeals Board, in considering the evidence in the record, finds it to be supported by a preponderance of the credible evidence and affirms claimant's average weekly wage on the date of accident as \$437.73.

Conclusions of Law

In workers compensation litigation it is the claimant's burden to prove his entitlement to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 44-501 and K.S.A. 1995 Supp. 44-508(g).

Respondent contends claimant has failed to prove accidental injury arising out of and in the course of employment and notice under K.S.A. 44-520. However, respondent provides no support for its position. Claimant testified that the injury he suffered was witnessed by several of respondent's employees and that he reported this accidental injury to his foreman, Mr. Brand, well within the ten-day statutory limitation. While claimant's testimony is not ironclad, it is sufficiently persuasive to convince the Appeals Board that claimant did suffer the accidental injury as described and did advise his supervisor of this accident in a timely fashion. The Appeals Board finds claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment with respondent and that he notified respondent within the ten-day limit of K.S.A. 44-520.

With regard to the nature and extent of claimant's injury and/or disability, the Appeals Board must look to K.S.A. 44-510e which states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

At regular hearing claimant was provided a substantial work-task analysis prepared at the request of his attorney. Unfortunately, while this analysis was provided to claimant in advance of the regular hearing, claimant did not take the opportunity to review the task analysis. During the regular hearing, which was extensive, requiring more than 180 pages of transcript, claimant was unable to answer in detail questions regarding the task analysis. Claimant was given several opportunities but he was unable to say whether these tasks were appropriately associated with his job. In addition, he was unable to discuss in detail whether he could or could not perform the various tasks in question.

At the termination of the regular hearing, claimant's attorney requested an extension of his terminal date which had been earlier established at the pre-hearing settlement conference. The purpose of the extension was to allow claimant additional time to review this task analysis and testify at a later time regarding the report. The Administrative Law Judge denied claimant's request for an extension finding that claimant had over a month to review the report and he did not believe that claimant would be able to accomplish the task in any reasonable amount of time in the future.

The Appeals Board notes that this task information was provided to claimant well in advance of the regular hearing. For whatever reason, claimant did not take the opportunity to review the exhibits and was unprepared for the regular hearing. In addition, claimant was unable to provide specific testimony regarding the tasks in the report. The Appeals Board notes that while this task report contains a general description of each job and discusses activities associated with each job, claimant was unable to testify whether the job descriptions or the activities associated with these jobs were appropriate and whether he would be physically unable to perform these tasks as a result of his injuries.

Dr. Prostic was provided a copy of the job task analysis and was questioned in detail regarding same. However, Dr. Prostic at times discussed specific jobs without breaking those jobs down into the various tasks described and at other times discussed physical restrictions placed upon claimant, specifically the lifting restrictions and whether they would prohibit claimant from performing various jobs. The Appeals Board finds that the task analysis provided to Dr. Prostic was not properly identified by claimant at the regular hearing and cannot be considered as competent evidence regarding claimant's 15-year task history. In addition, the testimony of Dr. Prostic was not specific in that it did not fully detail job tasks claimant was unable to perform as a result of this accident. Therefore, the Administrative Law Judge's denial of a task loss is supported by the credible evidence and it is affirmed.

The Appeals Board also finds the Administrative Law Judge's denial of claimant's request for an extension of terminal dates was appropriate as claimant had been given ample opportunity to review the report and claimant's failure to do so appears to stem from his own negligence or indifference.

With regard to the difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage claimant is earning after the injury, the Appeals Board must consider whether claimant was in violation of the policies set forth by the Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), and whether he failed to make a good faith effort to find employment after his termination of employment with respondent. Claimant received unemployment for a period of several months after leaving respondent's employment. During the time claimant was receiving unemployment, he made sufficient contacts to continue his unemployment. Once claimant's unemployment benefits terminated, claimant's attempts at finding employment also terminated. Claimant made only four minor contacts with prospective employers during a several-month period between the termination of his unemployment

benefits and the regular hearing. In addition, claimant was provided job search assistance by Mr. Lindahl. Even though Mr. Lindahl provided claimant with several leads, claimant failed to contact any of these employers. Claimant made several excuses why he did not follow through on this job search, none of which appear to be legitimate.

The Appeals Board finds, after reviewing claimant's testimony and the reports in evidence, that claimant did not put forth a good faith effort to find appropriate employment after his termination with respondent. The finder of fact is, therefore, mandated to determine an appropriate post-injury wage based upon all of the evidence in the record, including any expert testimony which may be available.

Evidence presented in the record indicates claimant turned down jobs paying anywhere from minimum wage up to \$8.19 per hour. The Administrative Law Judge in reviewing the evidence decided to adopt the suggestions of respondent that claimant should be imputed a wage of \$6.85 per hour for a 40-hour week which equals \$274 per week. This results in a wage loss of 37.4 percent when compared to claimant's average weekly wage of \$437.73. The Appeals Board, in considering the evidence in the record, finds this determination by the Administrative Law Judge to be appropriate and adopts same as its own finding.

In considering both the task loss analysis of 0 percent and the wage loss of 37.4 percent as required by K.S.A. 44-510e, the Appeals Board concludes that claimant has suffered a work disability of 18.7 percent.

Claimant contends an underpayment of temporary total disability was awarded as claimant's average weekly wage of \$437.73 would equate to a temporary total rate of \$291.83. In considering the award of the Administrative Law Judge, the Appeals Board notes that temporary total disability was awarded at a weekly rate of \$291.83. As the Appeals Board has affirmed the \$437.73 average weekly wage found by the Administrative Law Judge, the award of temporary total disability compensation at \$291.83 per week is found appropriate and is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated August 19, 1997, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's decision to deny claimant the opportunity to present evidence to establish task loss. The Administrative Law Judge had set claimant's terminal date for the date of regular hearing. At the regular hearing claimant's counsel requested an extension of his terminal date when claimant was unable to lay a proper foundation for his former job tasks. The Administrative Law Judge denied that request.

Comparing the slight delay which would have resulted from extending claimant's terminal date to the manifest injustice that will occur by restricting claimant's opportunity to present critical evidence causes me to conclude that good cause was shown to extend the terminal date. See K.S.A. 44-523(b)(4). Although I do not agree with claimant's theory regarding the method to determine task loss, he should be given the opportunity to create a record to argue that theory.

Based upon the above, I believe the proceeding should be remanded to the Administrative Law Judge to reopen the record.

BOARD MEMBER

c: John J. Bryan, Topeka, KS
D. Steven Marsh, Wichita, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director